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Nos. 571, 572 and 573

In the Supreme Court of the United States

OCTOBER TERM, 1939

LLOYD N. COBBLEDICK, INDIVIDUALLY AND AS VICE PRESIDENT OF COBBLEDICK-KIBBE GLASS COMPANY, A CORPORATION, AND COBBLEDICK-KIBBE GLASS COMPANY, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

A. H. BRAWNER, INDIVIDUALLY AND AS OFFICER AND DIRECTOR OF W. P. FULLER & COMPANY, A CORPORATION, AND W. P. FULLER & COMPANY, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

EUGENE PALMUTH, INDIVIDUALLY AND AS PRESIDENT OF CROWE GLASS COMPANY, A CORPORATION, AND CROWE GLASS COMPANY, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals in these cases (R. 62) has not yet been reported.[1]

JURISDICTION

The judgment of the Circuit Court of Appeals in each of these cases was entered on November 28, 1939 (R. 66). Petitions for writs of certiorari were granted by this Court on December 18, 1939. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an order denying a motion to quash a subpoena *duces tecum* commanding a witness to appear and to produce papers in an inquisitorial proceeding before a grand jury is a final decision within the meaning of Section 128 (a) of the Judicial Code.

STATUTE INVOLVED

Section 128 of the Judicial Code (U. S. C., Title 28, Section 225) provides in part as follows:

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[1] The Circuit Court of Appeals rendered a single opinion for all three cases. They were disposed of at the same time both in the District Court and the Circuit Court of Appeals and have, for practical purposes, been treated as one case. The paging and content of each of the three separate printed records are almost identical and the record references throughout this brief refer to all three records.

(a) *Review of final decisions.*—The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—

First. In the district courts, in all cases save where a direct review of the decisions may be had in the Supreme Court under section 345 of this title.

STATEMENT

On November 2, 1939, the United States Attorney for the Northern District of California presented a petition to the District Court for an order directing the issuance of subpoenas *duces tecum* directed to Lloyd N. Cobbledick, vice president of the Cobbledick-Kibbe Glass Company, Eugene Palmuth, president of the Crowe Glass Company, and A. H. Brawner, "officer and director" of W. P. Fuller & Co. (R. 2). The petition sought the appearance of the above parties[2] and the production of certain books, records, and documents before a grand jury sitting in the Northern District of California, Southern Division.

On November 2, 1939, pursuant to an order entered upon the petition (R. 3), a subpoena *duces tecum* was issued, directed to, and served upon each of the individuals named (R. 5–8). The subpoena

[2] In addition to these individuals, the petition sought the issuance of a subpoena directed to A. E. Schwartz. It does not appear that Mr. Schwartz filed a motion to quash and, in any event, he is not a party to these proceedings.

was returnable November 10, 1939 (R. 6). Thereupon, Cobbledick, Palmuth, and Brawner each moved individually and as an officer of his respective corporation, and jointly and severally with such corporation, for an order quashing and vacating the subpoena and quashing and vacating the paragraph in the subpoena requiring production of the documents (R. 10–13). At the time these petitions were filed there was no indictment nor information pending against any of the individuals subpoenaed nor against any of the corporations of which they were, respectively, officers.

The grounds upon which each of these motions was based are set forth in the record (R. 11–12). They may be summarized as follows:

That the subpoenas called for testimonial, as distinguished from written, evidence; that the enforcement of the subpoenas would require the witnesses to testify against themselves, in violation of the Fifth Amendment; that the subpoenas required the witnesses to determine which papers in their files were called for; that there was no showing of the materiality of the evidence called for to matters within the grand jury's jurisdiction; that enforcement of the subpoenas would amount to an unlawful search and seizure, in violation of the Fourth Amendment, and a deprivation of property, in violation of the Fifth Amendment.

On November 9, 1939, the District Court denied the motions to quash (R. 32–33). Thereupon, each

of the moving parties filed notices of appeal to the Circuit Court of Appeals for the Ninth Circuit (R. 43–44). On application for a stay pending appeal (R. 57), the Circuit Court of Appeals entered an order on November 27, 1939, staying the operation of the subpoenas *duces tecum* until further order of the court (R. 61). The cases were heard in the Circuit Court of Appeals upon the oral motion of the appellee to dismiss the appeals (R. 66). On November 28, 1939, that court entered judgment dismissing the appeal in each case (R. 66) on the ground, as stated in the opinion (R. 62–65), that the order was not final and therefore was not appealable under Section 128 (a) of the Judicial Code (U. S. C., Title 28, Section 225 (a)).

SUMMARY OF ARGUMENT

The order of the District Court denying the motions to quash the grand jury subpoenas was not a "final decision" within the meaning of Section 128 (a) of the Judicial Code. Petitioners erroneously insist that the motions to quash constituted an independent proceeding which was terminated by order denying the motions. In fact, the motions to quash were an intermediate step in a proceeding commenced for the purpose of securing evidence for use in a grand jury investigation. That proceeding commenced with the issuance of the subpoenas and is not ended until the court compels the production of the evidence through the use of its power to commit for contempt.

The applicable decisions of this Court demonstrate that a decision is not final for purposes of appeal unless it effectively terminates the rights of the parties to litigate the questions before the court making the decision. The present order does not meet that test because the same issues would be open if, after an unsuccessful appeal, the witnesses continued in their refusal to comply with the subpoenas and it became necessary to apply to the court for enforcement by contempt. Furthermore, an appeal at this stage of the proceedings would bring up issues which could all be disposed of on an appeal from a subsequent judgment in contempt. Petitioners' argument that the order is final as to the corporate petitioners is without merit because the corporations were not subpoenaed and therefore have no standing separate and distinct from the individuals who were subpoenaed.

ARGUMENT

THE ORDER OF THE DISTRICT COURT IS NOT A FINAL DECISION WITHIN THE MEANING OF SECTION 128 (a) OF THE JUDICIAL CODE AND HENCE IS NOT APPEALABLE

The pivotal issue in these cases is whether petitioners who were witnesses served with subpoenas *duces tecum* requiring them to produce documentary evidence before a grand jury, may appeal to the Circuit Court of Appeals from an order of the District Court denying their respective motions to quash the subpoenas. Both parties agree that

the answer to that question depends upon whether the decision is a final decision within the meaning of Section 128 (a) of the Judicial Code which gives the circuit courts of appeals "appellate jurisdiction to review by appeal final decisions" by district courts in all cases except as otherwise specified. Petitioners contend that the denial by the District Court of the motions to quash the subpoenas must be considered as a final decision within the meaning of the statute. We submit that petitioners' argument is premised on an erroneous theory as to the nature of the proceedings in the District Court. In our view a proper consideration of the scope of that proceeding plainly demonstrates that the order denying the motions to quash was interlocutory in character and hence not reviewable under the applicable decisions of this Court.

1. *The nature of the proceedings in the District Court*

Stated in its simplest form, petitioners' argument appears to be that since there was no other proceeding pending in the District Court, the motions to quash the subpoenas were an independent proceeding and therefore the denial of the motions to quash finally decided that independent proceeding. To support this proposition petitioners have cited numerous cases—most of which relate to proceedings brought to recover evidence alleged to have been wrongfully seized—which superficially appear to lend some color to their claim. As we

shall subsequently point out in our analysis of the cases, those decisions deal with situations in which the orders of the district courts forever ended the complaining parties' rights to litigate in those courts the questions involved in the proceedings. In the cases at bar, on the other hand, the denial of the motions to quash did not end petitioners' rights to challenge the subpoenas in the District Court, nor did it in any way change the rights, duties, and obligations of petitioners. The subpoenas remain outstanding but the documents remain in petioners' possession. No further order has been entered against petitioners and they may, if they choose, stand on the asserted invalidity of the subpoenas. If the court is subsequently called upon to compel obedience to the subpoenas, petitioners are free to contest the validity of the subpoenas on whatever ground they desire to urge. In other words, the refusal to quash the subpoenas did not end the petitioners' rights to litigate in the District Court the questions raised by their motions.

The basic fallacy in petitioners' argument is that they endeavor to dispose of the issue by merely denominating their attempt to quash the subpoenas as an "independent proceeding." Their only effort to support this position is an argument to the effect that there was no indictment, information, or contempt proceeding then pending in which the order denying the motion could have been interlocutory. But petitioners err in their fundamental

assumption that no proceeding of any kind was pending prior to filing their motions to quash; they unwarrantedly assume that pendency of a prior proceeding depends in these cases upon whether an indictment has been returned, information filed, or contempt proceeding initiated.

If it is pertinent to spell out the existence of a proceeding in which the present order was merely an interlocutory step, it is not difficult to do so. The proceeding was commenced by the *ex parte* application of the United States Attorney for the issuance of the subpoenas (R. 2); the order of the court directing that subpoenas be issued (R. 3); and the service of the subpoenas on the individual petitioners (R. 8). It was those steps which started a proceeding to compel the production of certain evidence before the grand jury. If any contest were to develop, it could be finally decided only by an order which specifically compelled the production of the evidence or permanently denied the right to secure the evidence.

When petitioners interposed in this situation a motion to quash the subpoenas, they did not commence an independent proceeding because the motions were directed to the outstanding subpoenas and were dependent on their existence. The motions to quash served the purpose of presenting to the court the objections which could be raised in defense to an application for an order enforcing the subpoenas; without petitioners subjecting them-

selves to the risk of such an order being entered. In a sense, the motions were analogous to demurrers or motions to dismiss, and after the court overruled them petitioners were neither under greater compulsion than they had been prior to filing the motions nor had they lost the right to have the District Court pass upon their contentions before entering an order compelling the production of evidence. It is significant that petitioners themselves suggest no rights lost to them by the denial of the motions to quash. All of their fears are grounded on the fact that they may not be able to prosecute an appeal before having to choose between compliance with the subpoenas and subjecting themselves to the risk of being adjudged in contempt.

2. *The instant order is interlocutory in character.*

In the past this Court has frequently had occasion to consider the meaning of the phrase "final decision" as it is used in statutes defining appellate jurisdiction.[7] Perhaps the clearest statement on the point is found in *St. Louis, I. M. & S. R. R. Co.*

[7] It is immaterial that in some instances the court was considering other statutes defining the scope of appellate jurisdiction. In *Ex parte Tiffany*, 252 U. S. 32, 36, this Court had under consideration the appealability of an order under Section 128 of the Judicial Code, the section here involved. In regard to this section, the Court said:
"The words 'final decisions in the district courts' mean the same thing as 'final judgments and decrees' as used in former acts regulating appellate jurisdiction."

v. *Southern Express Co.*, 108 U. S. 24, 28, where the rule is stated as follows:

> * * * a decree is final, for the purposes of an appeal to this court, when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.

Obviously this test is not met by an order denying motions to quash. At this stage of the proceeding there is no order outstanding against petitioners which could be enforced by execution or otherwise. It is elementary that the subpoenas are not self-executing. The order denying the motions to quash those subpoenas did not change their character or place any further obligation on petitioners. The most that can be said of the court's action is that it indicated that when and if the occasion arose the court might enter an order which could be enforced by execution. All that petitioners now have to complain about is this preliminary indication of the view which the court might adopt if it became necessary for the grand jury to seek the aid of the court in obtaining the evidence.

Curiously enough this Court has never before passed upon precisely this situation. However, there are several decisions dealing with analogous situations which serve to demonstrate the interlocutory character of the instant order. Those cases arose as the result of the refusal of a witness who was not a party to a proceeding then pending

to testify or produce evidence. This Court has uniformly held that in such circumstances the witness could not appeal from the refusal of the court to relieve him of his obligation to testify or produce the evidence unless he had been adjudged in contempt for failure to do so.

The application of the rule is most forcefully demonstrated by the decision in *Alexander* v. *United States*, 201 U. S. 117. Alexander was a witness who had been served with a subpoena *duces tecum* requiring him to appear and produce documents before a special examiner appointed by the court to take evidence in regard to a particular issue raised in a civil suit which was then pending in the Circuit Court for the Eastern District of Wisconsin. Although Alexander was an officer of one of the corporate defendants, he was not a party to the civil suit and whatever rights he had to resist the subpoena were those of a stranger to the litigation. Upon his assertion of those rights and his refusal to answer questions or to produce the documents, the United States petitioned the Circuit Court for an order commanding him to do so. The court entered the order sought and from this ruling Alexander appealed to this Court. After consideration of the case it was held that the appeal should be dismissed for want of jurisdiction because the order of the Circuit Court was not a final decision. But the opinion clearly indicates that if Alexander had been adjudicated in contempt there

would then have been a final order from which an appeal could have been taken.

The rule followed in the *Alexander* case was again applied in *Webster Coal Co.* v. *Cassatt*, 207 U. S. 181. In that case a civil action had been brought by a shipper against the Pennsylvania Railroad pursuant to the Interstate Commerce Act. The plaintiff petitioned the Circuit Court for an order directing Cassatt and other officers of the Railroad Company, none of whom was a party to the pending litigation, to produce books and records in their possession. This petition was granted by the Circuit Court, but the Circuit Court of Appeals reversed. On certiorari this Court held that the action of the Circuit Court of Appeals was erroneous because the order was not final, and hence not reviewable. This holding was followed in *Pennsylvania Coal Co.* v. *Cassatt*, 207 U. S. 187. See also *Capital Company* v. *Fox*, 85 F. (2d) 97 (C. C. A. 2d); *Goodyear Tire & Rubber Co.* v. *Jamaica Truck Tire Service Co.*, 66 F. (2d) 91 (C. C. A. 7th).

We are unable to discover any substantial distinction which would justify refusal to apply the rule of the foregoing cases to the cases at bar. If the orders involved in those cases were not final, the order here is even more clearly interlocutory; for in the above cases the proceedings had been carried to a more advanced stage before the entry of the orders in question. In each of those cases the subpoena had been served, the witness had ap-

peared, and he was litigating the question of his right to refuse to answer certain questions or to produce certain documents. The order left a choice between only two courses: The witness might comply with the subpoena; or he might refuse, thereby incurring liability to punishment for contempt.

In the cases at bar, however, the witnesses had not appeared. Upon their appearance, pursuant to the subpoenas, they might still refuse to answer particular questions or to produce particular documents. In that event it would be necessary for the government to petition the court to direct them to answer, or for the grand jury to present them for contempt. Upon such a petition or presentment every question which the petitioners sought to raise by their motion in the District Court could be raised and passed upon again. We submit that if an order compelling the witness to answer and to produce documents pursuant to the subpoena is interlocutory, an order entered at a previous stage of the litigation refusing to quash the subpoena is, *a fortiori*, interlocutory.

Petitioners have attempted to distinguish the cases discussed above on the ground that in each of the cases the order involved was merely interlocutory in pending litigation. We think it apparent that the decisions do not rest on any such narrow or fictitious basis. Obviously, in each of the above cases the witnesses, by refusing to testify or to produce evidence, were asserting rights that were personal to them. They were not entitled to assert,

and did not assert, any rights which accrued to the litigating parties. So far as the witnesses were concerned, their rights were entirely separate from those of the litigating parties. The rights of the litigating parties might be affected by rulings upon the *admissibility* of evidence, and rulings of this character are interlocutory because the objections can be saved for hearing upon appeal from the final judgment on the ultimate issues of the case. But the personal rights of witnesses to refuse to testify or produce evidence are not involved on the appeal by the parties from final judgment. Any order directed to witnesses is entirely different in character from orders affecting the rights of litigating parties and has no connection with or dependence upon the rights of such parties.

An order such as was involved in the *Alexander* case, which does no more than command a witness to answer, escapes being final because it does not actually adjudge the witness in contempt for his insistence upon standing on his personal rights. The witness has another opportunity to urge his position in contempt proceedings. Hence, the order to testify or produce evidence is not final. The pendency of a legal proceeding *per se* does not make the order directed to the witness interlocutory because obviously the witness' rights cannot be urged upon appeal from a final judgment in the principal suit as can the rights of litigants.

Consequently, we submit that the pivotal consideration in determining the finality of orders directed to witnesses who are strangers to pending litigation must be whether the order effectively puts an end to the witness' opportunity to have his asserted rights passed upon by the court which enters the order. If the witness will have another opportunity in the lower court to assert his rights before there is any invasion of those rights, the order is not final and is not appealable.

Throughout their brief, petitioners' chief reliance is upon cases involving applications for the return of property allegedly wrongfully seized for use as evidence. If there were any merit in the argument that the mere pendency of a proceeding in and of itself determines the interlocutory character of an order, it seems apparent that the rule would be applicable to an order denying a stranger the right to have his property returned when it is being held for use as evidence in a proceeding between other parties. But it has been held that in such circumstances the order is final and the applicant may appeal regardless of the pending proceeding. *Go-Bart Co.* v. *United States*, 282 U. S. 344. So, here, even if there were no pending proceeding the order would yet not be final. The test is simply whether anything remains before enforcement of the order.

It is, of course, true that the existence of a pending proceeding raises strong practical objections to

allowing a witness to impede the administration of justice by appealing from the refusal of a court to sustain asserted rights not to give evidence. No doubt the desire of courts to prevent delays based on frivolous objections has had some influence upon decisions that witnesses must actually be adjudged in contempt before the order is final. However, those considerations are equally forceful in this case. A pending proceeding—the grand jury investigation—was in progress and the evidence was required for that proceeding. The rule which petitioners seek to have established would leave the door open for every witness who is subpoenaed to appear before a grand jury to obstruct the grand jury proceeding by appealing from an order involving the validity of the subpoena, which order had been entered on a motion made without danger of being adjudged in contempt of court. The ease with which such questions could be raised without incurring risk would certainly encourage obstructionist tactics.

This leads to another important practical consideration. A witness, of course, always has the right to appeal from the order punishing him for contempt. *Nelson* v. *United States*, 201 U. S. 92. See also *Union Tool Co.* v. *Wilson*, 259 U. S. 107; *Cogen* v. *United States*, 278 U. S. 221. Consequently, any rule which permitted an appeal from an order made prior to the entry of an order punishing a witness for contempt would leave the door

open for a witness to prosecute two appeals on identical issues. A recalcitrant witness might appeal from the first order requiring him to testify and if unsuccessful might continue to refuse and then appeal from an order adjudging him in contempt. As a result, there would be two appeals on issues which could all be disposed of on the appeal from the final order adjudging the witness in contempt. This would contravene the settled rule that cases are not reviewable in fragments and judgments are not appealable under the statute unless they are "not only final, but complete." *Moss* v. *Kansas City Life Ins. Co.*, 96 F. (2d) 108, 110.

Ordinarily the possibility of two appeals would appear to be more fancied than real. However, in the case of grand jury subpoenas it would offer an opportunity for witnesses effectively to obstruct justice and thus it becomes a very real danger. The life of a grand jury is limited to one term of court and may be extended only for two additional terms (U. S. C., Title 28, Section 421). It is conceivable that a recalcitrant witness bent on delay might be able to litigate the validity of his subpoena until the grand jury term expired and thus render moot the question of whether the evidence should be produced. Particularly is this true in districts such as the Southern District of New York where the terms of court are not over one month in length (U. S. C., Title 28, Section 452).

3. *The decisions relied upon do not support petitioners' contentions*

The principal cases relied upon by petitioners as supporting their argument that the instant order was a final order entered in an independent proceeding are *Perlman* v. *United States*, 247 U. S. 7; *Cogen* v. *United States*, 278 U. S. 221; and *Go-Bart Co.* v. *United States*, 282 U. S. 344. The same cases are the basis of the decision of the Circuit Court of Appeals for the Second Circuit in *In re Cudahy Packing Co.*, 104 F. (2d) 658, which is in direct conflict with the decision in the cases at bar upon substantially similar facts. These decisions all relate to the appealability of orders granting or denying applications for the return of documents or property alleged to have been wrongfully seized. In the *Cogen* case Mr. Justice Brandeis analyzed the decisions on the subject. That analysis may be summarized as follows: (a) Where the application is made before the commencement of any proceedings against the applicant, the order upon such application is final and appealable.[4] (b) Where the application is made after the commencement of proceedings by the filing of an indictment or information against the applicant, the order upon such application is not final. In such cases the right of review does not accrue until after a final judgment

[4] *Foley* v. *United States*, 64 F. (2d) 1 (C. C. A. 5th); *In re Milburne*, 77 F. (2d) 310 (C. C. A. 2d); *United States* v. *Poller*, 43 F. (2d) 911 (C. C. A. 2d).

on the indictment or information, to which the proceedings for the return of the documents are regarded as ancillary.[5] (c) Where the application is made after the filing of an indictment or information, but upon behalf of a person not charged in the indictment or information, the order is final and appealable.[6]

The general rule that follows from the foregoing analysis is that an appeal may be taken from an order granting or denying an application for the return of property or documents in all cases except where the applicant is a party to a pending proceeding to which the question of the custody of the property or documents is related. There is no conflict between this rule and our position in the instant cases. An application for an order compelling return of documents is the initial step in the judicial process and is in no way dependent on any prior judicial action. When the court passes upon the application it decides all questions relating to the custody and petitioners do not seriously contend that those issues could ever be presented to the court again.[7] In other words, the possibility of litigating

[5] *Coastwise Lumber and Supply Co.* v. *United States*, 259 Fed. 847 (C. C. A. 2d); *United States* v. *Broude*, 299 Fed. 332 (D. Minn.); *Jacobs* v. *United States*, 8 F. (2d) 981 (C. C. A. 9th); *United States* v. *Sheehan*, 57 F. (2d) 759 (W. D. N. Y.); *United States* v. *Marquette*, 270 Fed. 214 (C. C. A. 9th).

[6] *Go-Bart Co.* v. *United States*, 282 U. S. 344.

[7] Petitioners suggest in rather summary fashion that although the government can appeal from an order granting an application for the return of documents under the rule of *Burdeau* v. *McDowell*, 256 U. S. 465, it would still be

in that court the issues as to the custody of the documents is forever ended by the decision on the application. It is this fact that makes the decision final.

Petitioners, as well as the Circuit Court of Appeals for the Second Circuit, place particular stress on the decision in *Perlman* v. *United States*, 247 U. S. 7. In that case certain exhibits had been introduced and impounded by the court in connection with prior proceedings involving a patent infringement. The United States Attorney later obtained an order giving him access to these exhibits for use in connection with grand jury proceedings involving perjury charges against the petitioner, whose property the exhibits were. The petitioner, prior to the return of an indictment against him, sought to have the United States Attorney restrained and enjoined from taking possession of the exhibits. The District Court denied the petition and, upon appeal and error to the Supreme Court, the government moved to dismiss. The motion was denied by this Court. The fol-

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necessary to use contempt proceedings to compel a government officer to make delivery. Granting that that is true, it is beside the point because a government officer who refused to make delivery in obedience to a court order would have no standing in a contempt proceeding to question the correctness of the court's ruling in making the order. On the other hand, it is settled that a witness has standing to be heard on all questions relating to the validity of a subpoena at the time the court passes on the question of whether he should be adjudged in contempt. See *Graham* v. *United States*, 99 F. (2d) 746, 750 (C. C. A. 9th).

lowing statement is all that appears in the opinion on the question of the finality of the lower court's order (247 U. S. 7, 12–13):

> The second contention of the Government is somewhat strange, that is, that the order granted upon its solicitation was not final as to Perlman but interlocutory in a proceeding not yet brought and depending upon it to be brought. In other words, that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur.

From the foregoing quotation it is apparent that this court treated the case as raising the simple question of whether or not a person not involved in any pending proceeding could appeal from an order which placed in the hands of the United States Attorney documents which were in possession of the court. Obviously, the court was of the opinion that such a situation was no different from an application for the return of documents wrongfully seized, because it is expressly stated that the applicant was "powerless to resist." That in itself distinguishes the case from the instant cases because here the petitioners have the power to resist the subpoenas and to continue to refuse production of the evidence.

Petitioners seek to bring the holding in the *Perlman* case closed to the facts in the cases at bar

by emphasizing the fact that the order appealed from in the *Perlman* case denied a motion to vacate a previous order. In their brief (p. 11) they say that Perlman's "petition amounted, in effect, to a 'motion to quash' the order". It is difficult to perceive how this twisting of phraseology aids petitioners for it is clear that this Court was only concerned with the fact that an order had been entered which finally determined the custody of the documents and which could not be resisted. It is true, as petitioners point out, that both cases involve "the government's access to documents." But in the *Perlman* case the order gave that access without more; in the instant cases petitioners still have the control of the documents, and if they stand upon their rights further proceedings will be necessary to gain access.

The only decision of this Court other than those relating to applications for the return of property, which petitioners characterize as being closely analogous to the cases at bar is *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434. In that case proceedings were brought under Section 12 of the Interstate Commerce Act for an order directing a witness to answer certain questions, and to produce certain documents. The proceedings resulted in the entry of such an order, which was held to be appealable.[8] The determination that the

[8] It should be emphasized that the *Ellis* case was instituted pursuant to special statutory provisions authorizing the Interstate Commerce Commission to invoke the aid of

order was appealable was not placed on the ground that the proceeding was "independent," but upon the ground that the order was "the end of a proceeding begun against the witness" (p. 442). In other words, the order, like a contempt order for the enforcement of a subpoena, finally determined, insofar as the lower court was concerned, the obligations of the witness to testify and produce documents before the Commission. We submit that this decision clearly demonstrates the soundness of our contention that the test of finality is whether the order ends the opportunity for litigating the issue in the court which enters the order.

4. The appeals of the corporate petitioners were properly dismissed regardless of the finality of the order

Petitioners argue that on any theory of the case the order was final as to the corporate petitioners because no contempt proceeding could be prosecuted against the corporations. This argument is more

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the courts to compel the testimony of witnesses and the production of books, papers, and documents in proceedings before the Commission. Securing the attendance and testimony of witnesses and the production of books, papers, and documents was the sole purpose of the legal proceedings authorized by statute, and the order of the court directing Elfis to answer certain questions and produce certain documents was obviously the final judgment in the case and, therefore, was appealable.

ingenious than persuasive. Obviously no contempt proceedings could be prosecuted against the corporations as such because no subpoenas were ever issued to the corporations.[9] But the subpoenas were directed to the individuals who were the officers of the corporations. Those individuals are the persons charged with the duty of protecting the corporate interests. Any assertion of corporate rights would necessarily have to be made by an officer of the corporation because the officers are the means by which the corporate interests are protected. Petitioners do not even suggest that there are any rights which the corporate officers could assert in the name of the corporation but could not assert in their own names as individuals. Obviously, no such rights exist. In these circumstances it is apparent that the corporate interests will be adequately protected when an application is made to have the individual officers adjudged in contempt. Likewise, the corporate interests will be fully protected on the appeal from any final order adjudging the individuals in contempt. To argue that the instant order denying the motions to quash are final as to the corporations but not as to the individuals because the corporations cannot be parties to con-

[9] The subpoenas were not directed to the corporations or to the officers of the corporations generally. The subpoenas were addressed specifically to Cobbledick, Palmuth, and Brawner, respectively, as individuals (R. 5).

tempt proceedings, is to belabor the corporate fiction to the point of absurdity.

However, if petitioners insist upon regarding the corporations as raising issues separate and distinct from those raised by the individuals who were subpoenaed, they must accept the consequences of carrying the argument to its logical end. Assuming that the corporations are separate and distinct from the individuals, they have never been subpoenaed and are under no requirement to produce any documents. On this theory the only parties that are in any way affected by the subpoenas are the individuals who were served. It is their rights which are affected by the subpoenas and they are the only ones who have standing in court to assert those rights. Anyone else attempting to be heard in regard to the invasion of the rights of the persons subpoenaed would be a mere volunteer without standing to object to the court's ruling or appeal therefrom. If the corporate petitioners insist that they are in a different position from the individuals, their petitions plainly should be dismissed because the corporations, when considered as separate and distinct from the individuals, have never had legal standing to protest against the subpoenas which were not addressed to them.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

FRANCIS BIDDLE,
Solicitor General.
THURMAN ARNOLD,
Assistant Attorney General.
WENDELL BERGE,
JAMES C. WILSON,
Special Assistants to the Attorney General.
THOROLD JOHNSON DEYRUP,
Special Attorney.

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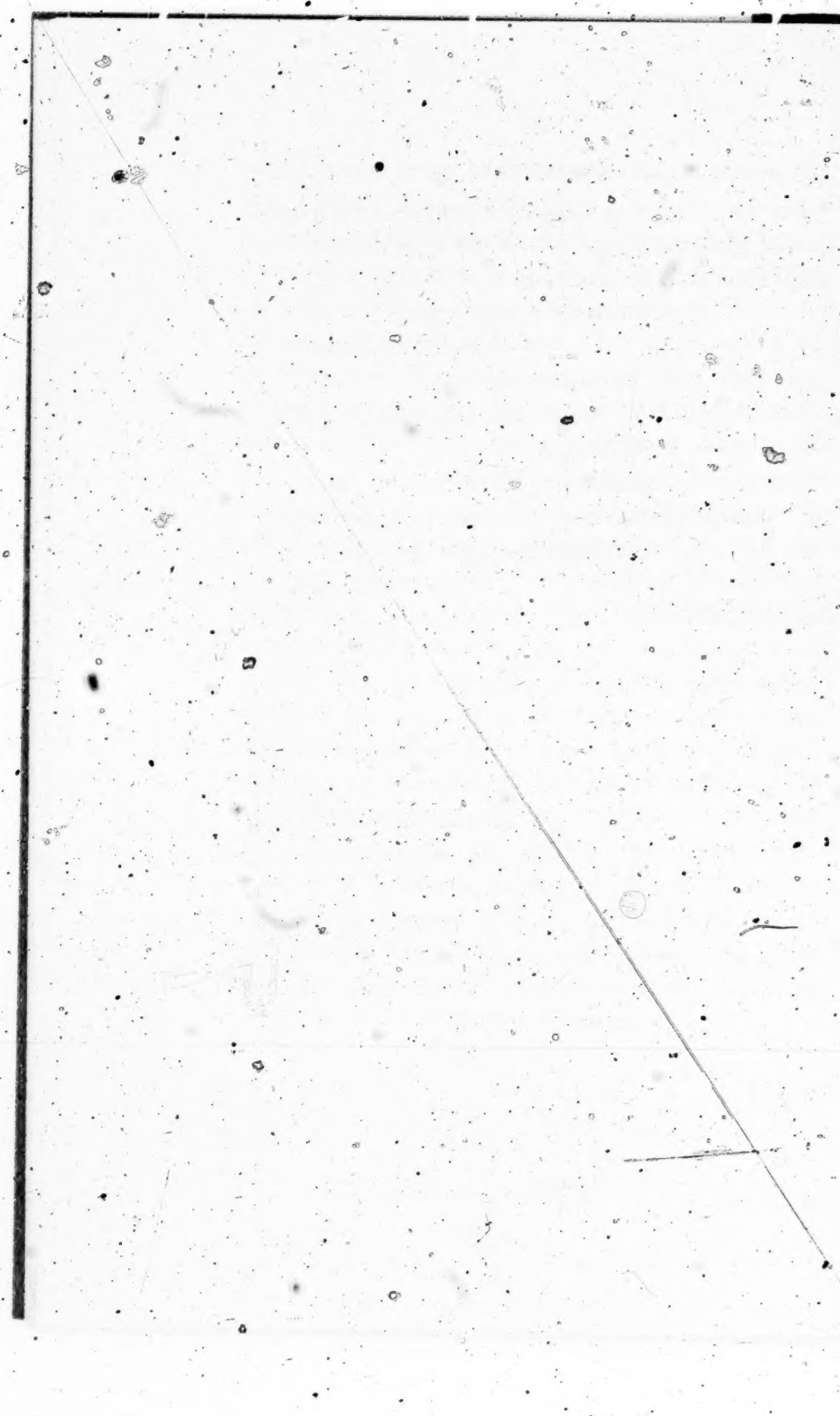

P. 1

SUPREME COURT OF THE UNITED STATES.

Nos. 571-572-573.—October Term, 1939.

Lloyd N. Cobbledick, Individually and as Vice President of Cobbledick-Kibbe Glass Co., a Corporation, and Cobbledick-Kibbe Glass Co., a Corporation, Petitioners,
571 vs.
United States of America.

A. H. Brawner, Individually and as Officer and Director of W. P. Fuller & Co., a Corporation, and W. P. Fuller & Co., a Corporation, Petitioners,
572 vs.
United States of America.

Eugene Palmuth, Individually and as President of Crowe Glass Co., a Corporation, and Crowe Glass Co., a Corporation, Petitioners,
573 vs.
United States of America.

On Writs of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

[February 26, 1940.]

Opinion of the Court by Mr. Justice Frankfurter announced by the Chief Justice.

~~Mr. Justice Frankfurter delivered the opinion of the Court.~~

The District Court for the Northern District of California denied motions to quash subpoenas *duces tecum* addressed to the petitioners and directing them to appear and produce documents before a United States grand jury at the July, 1939, term of that court. From the denial of these motions petitioners sought review by way of appeal to the Circuit Court of Appeals for the Ninth Circuit. That court found itself to be without jurisdiction and dismissed the appeals. We brought the cases here, 308 U. S. —, because of conflict between the decision below and that of the Circuit Court of Appeals for the Second Circuit, *In re Cudahy Packing Co.*, 104 F. (2d) 658. The matter in controversy—and the sole question raised in all three cases—vitally concerns the effective administration

of the federal criminal law. The question is whether an order denying a motion to quash a subpoena *duces tecum* directing a witness to appear before a grand jury is included within those "final decisions" in the district court which alone the circuit courts of appeal are authorized to review by § 128(a) of the Judicial Code (28 U. S. C. § 225).[1]

Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act[2] and has been departed from only when observance of it would practically defeat the right to any review at all.[3] Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice. Not until 1889 was there review as of right in criminal cases.[4] An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial

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[1] Section 128(a) provides that, "The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions. . . ." Similar language was used in the Act of 1891, c. 517, 26 Stat. 828.

[2] §§ 21, 22, 25 of the Act of September 24, 1789, 1 Stat. 73, 83-85. For a discussion of the historical background, English and American, of the finality concept, see Crick, The Final Judgment as a Basis for Appeal, 41 Yale L. J. 539.

[3] See § 129 of the Judicial Code, 28 U. S. C. § 227, dealing with appeals from interlocutory injunctions, appeals from interlocutory decisions in receivership cases and from interlocutory decrees determining rights and liabilities in admiralty litigation.

[4] See United States v. More, 3 Cranch 159. Only by certificate of division of opinion in the circuit courts could review be obtained. See Curtis, Jurisdiction of the United States Courts, 82. By the Act of 1889 review as of right was allowed in capital cases. 25 Stat. 655, 656. For the history of federal criminal appeal see United States v. Sanges, 144 U. S. 310, 319-22.

court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal. *Cogen* v. *United States*, 278 U. S. 221.

In thus denying to the appellate courts the power to review rulings at *nisi prius*, generally, until after the entire controversy has been concluded, Congress has sought to achieve the effective conduct of litigation. For purposes of appellate procedure, finality—the idea underlying "final judgments and decrees" in the Judiciary Act of 1789 and now expressed by "final decisions" in § 128 of the Judicial Code—is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system. As an instrument of such policy the requirement of finality will be enforced not only against a party to the litigation but against a witness who is a stranger to the main proceeding. Neither a party nor a non-party witness will be allowed to take to the upper court a ruling where the result of review will be "to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation . . . ." Mr. Chief Justice Taft, in *Segurola* v. *United States*, 275 U. S. 106, 112. This is so despite the fact that a witness who is a stranger to the litigation could not be party to an appeal taken at the conclusion of the main cause. Such was the ruling in *Alexander* v. *United States*, 291 U. S. 117. In that case, witnesses were directed to appear and produce documents before a special examiner designated by the circuit court to hear testimony in a suit brought by the United States to enforce the Sherman Law. Upon refusal to submit the documents called for in the subpoena, the United States petitioned the circuit court for an order requiring compliance. The petition was granted, and appeals were then allowed to this Court. These appeals were dismissed for want of jurisdiction. The grounds of the decision are best indicated in the language of the opinion:

"In a certain sense finality can be asserted of the orders under review, so, in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, leaving to him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court go further and punish the witness for contempt of its order, then arrives a right of review, and this is adequate for his protection without unduly impeding the progress of the case . . .

This power to punish being exercised the matter becomes personal to the witness and a judgment as to him. Prior to that the proceedings are interlocutory in the original suit." 201 U. S. at 121-22.

We must now decide whether the situation of a witness summoned to produce documents before a grand jury is so different from that of the witness in the *Alexander* case that the sound considerations of policy controlling there should not govern here. The Constitution itself makes the grand jury a part of the judicial process. It must initiate prosecution for the most important federal crimes. It does so under general instructions from the court to which it is attached and to which, from time to time, it reports its findings. The proceeding before a grand jury constitutes "a judicial inquiry", *Hale* v. *Henkel*, 201 U. S. 43, 66, of the most ancient lineage. See *Wilson* v. *United States*, 221 U. S. 361. The duration of its life, frequently short, is limited by statute. It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found. Opportunity for obstructing the "orderly progress" of investigation should no more be encouraged in one case than in the other. That a grand jury proceeding has no defined litigants and that none may emerge from it, is irrelevant to the issue. The witness' relation to the inquiry is no different in a grand jury proceeding than it was in the *Alexander* case. Whatever right he may have requires no further protection in either case than that afforded by the district court until the witness chooses to disobey and is committed for contempt. See *Hale* v. *Henkel*, *supra*, and *Wilson* v. *United States*, *supra*. At that point the witness' situation becomes so severed from the main proceeding as to permit an appeal. To be sure, this too may involve an interruption of the trial or of the investigation. But not to allow this interruption would forever preclude review of the witness' claim, for his alternatives are to abandon the claim or languish in jail.

This analysis of finality is illustrated by *Perlman* v. *United States*, 247 U. S. 7.[5] There, exhibits owned by Perlman and impounded in court during a patent suit were, on motion of the United States attorney, directed to be produced before a grand jury. Perlman petitioned the district court to prohibit this use, invoking a constitutional privilege. This petition was denied and Perlman sought review here. The United States claimed that the action of the

[5] Compare Go Bart Co. v. United States, 282 U. S. 344.

district court was "not final" but merely interlocutory and therefore not reviewable by this Court. We rejected the Government's contention. To have held otherwise would have rendered Perlman "powerless to avert the mischief of the order . . . ." 247 U. S. at 12. Perlman's exhibits were already in the court's possession. If their production before the grand jury violated Perlman's constitutional right then he could protect that right only by a separate proceeding to prohibit the forbidden use. To have denied him opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any appellate review of his constitutional claim. Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes.[6]

One class of cases dealing with the duty of witnesses to testify presents differentiating circumstances. These cases have arisen under § 12 of the Interstate Commerce Act, whereby a proceeding may be brought in the district court to compel testimony from persons who have refused to make disclosures before the Interstate Commerce Commission.[7] In these cases the orders of the district court directing the witness to answer have been held final and reviewable. *Interstate Commerce Comm.* v. *Brimson*, 154 U. S. 447; *Harriman* v. *Interstate Commerce Com.*, 211 U. S. 407; *Ellis* v. *Int. Com. Comm.*, 237 U. S. 434. Such cases were duly considered in the *Alexander* case, and deemed to rest "on statutory provisions which do not apply to the proceedings at bar, and, while there may be resemblances to the latter, there are also differences." 201 U. S. at 121. The differences were thought controlling. Appeal from an order under § 12 was again here in the *Ellis* case, *supra*, fully argued in the briefs, and again differentiated from a situation like that in the *Alexander* case. "No doubt" was felt that an appeal lay from the

[6] Burdeau v. McDowell, 256 U. S. 465, is consistent with our analysis. In that case proceedings were commenced in the district court for the recovery of documents held by the Government for use before a grand jury. The district court granted the relief sought, and the Government appealed. In this Court the action of the district court was treated as final, and hence subject to review. But the practical considerations there involved were entirely different from those which must govern here. In Burdeau v. McDowell the action of the district court was itself an interruption of the grand jury's inquiry; appeal by the Government did not halt the "orderly progress" of the inquiry.

[7] 25 Stat. 858; 49 U. S. C. § 12.

district court's direction to testify. "It is the end of a proceeding begun against the witness"—was the pithy expression for this type of case. 237 U. S. at 442. And it is a sufficient justification for treating these controversies differently from those arising out of court proceedings unrelated to any administrative agency. The doctrine of finality is a phase of the distribution of authority within the judicial hierarchy. But a proceeding like that under § 12 of the Interstate Commerce Act may be deemed self-contained, so far as the judiciary is concerned—as much so as an independent suit in equity in which appeal will lie from an injunction without the necessity of waiting for disobedience. After the court has ordered a recusant witness to testify before the Commission, there remains nothing for it to do. Not only is this true with respect to the particular witness whose testimony is sought; there is not, as in the case of a grand jury or trial, any further judicial inquiry which would be halted were the offending witness permitted to appeal. The proceeding before the district court is not ancillary to any judicial proceeding. So far as the court is concerned, it is complete in itself.

We deem it unnecessary to say more in sustaining the Circuit Court of Appeals. The challenged judgment is

Affirmed.

Mr. Justice MURPHY did not participate in the consideration or decision of these cases.

A true copy.

Test:

Clerk, Supreme Court, U. S.